

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF AND
APPENDIX**

10/21
To be argued by: JULES E. COVEN

77-4144

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-~~4174~~

CHENG, MAU KWAI (A15 658 475)

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

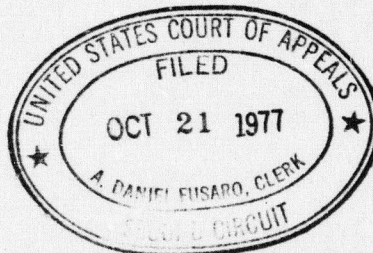
BRIEF and APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
CHENG, MAU KWAI (A15 658 475) :
Petitioner, :
- against - : DOCKET NO. 77-4174
IMMIGRATION AND NATURALIZATION :
SERVICE, :
Respondent. :
-----x

BRIEF OF PETITIONER

PRELIMINARY STATEMENT

The petitioner seeks review of an Order of the Board of Immigration Appeals dated September 10, 1973 which denied the petitioner's application for the suspension of his deportation, pursuant to Sec. 244 of the Immigration and Nationality Act of 1952, as amended, and review of an Order of the Board of Immigration Appeals dated June 28, 1977, which denied the petitioner's Motion to Reopen his deportation proceedings to consider further evidence which arose since the decision of the Board in 1973. The jurisdiction of this Court in this matter is pursuant to the provisions of Public Law 87-301, 8 U.S.C. 1105(a).

STATUTE INVOLVED

Section 244 (a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1254 provides:

"Sec. 244 (a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and -

1. is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States, or an alien lawfully admitted for permanent residence."

QUESTIONS INVOLVED

1. WAS THE ATTORNEY GENERAL IN ERROR WHEN HE FOUND THAT THE PETITIONER WOULD NOT SUFFER EXTREME HARDSHIP IF HE WAS DEPORTED FROM THE UNITED STATES?
2. DID THE ATTORNEY GENERAL CONSIDER ALL OF THE RELEVANT FACTORS IN FINDING THAT THE PETITIONER WOULD NOT SUFFER EXTREME HARDSHIP IF DEPORTED FROM THE UNITED STATES?
3. DID THE ATTORNEY GENERAL ABUSE HIS DISCRETION IN DENYING THE PETITIONER'S APPLICATION FOR SUSPENSION OF HIS DEPORTATION?
4. WAS THE BOARD OF IMMIGRATION APPEALS IN ERROR WHEN THEY DENIED THE MOTION TO REOPEN THE DEPORTATION PROCEEDINGS?

THE FACTS

The petitioner is a fifty year old native and citizen of the Republic of China. He has resided in the United States thirteen years, since he entered in March, 1964. The petitioner fled from the Mainland of China when the Communists took control of that country, and he has been seeking refuge ever since that time. Prior to his entry into the United States he served as a seaman.

The alien first had a deportation hearing in June, 1964. His proceedings were later reopened in 1971 so that he would be able to apply for the suspension of his deportation, pursuant to Sec. 244 of the I&N Act. This application is based upon the petitioner having resided in the United States for more than seven years.

Statutory requirements for eligibility of suspension of deportation are that an applicant be physically present in the United States for at least seven years, and that he must show that he would suffer extreme hardship if he were deported from the United States. The alien petitioner has satisfied the first part of the statute, residence for more than seven years (thirteen years).

At his reopening hearing in 1973, the alien alleged the following:

That he would suffer extreme hardship because he is a

refugee from the Communist dominated country, and therefore, his stay in Hong Kong was merely as a refugee and that he is still seeking refuge today; that he does not have a permanent place of abode in Hong Kong; that he does not wish to return to the Mainland of China because of the Communist domination of that country; that he has now grown accustomed to life in the United States; for him to be forced to leave now would be a psychological and physical handicap to him; that he has never been arrested in the United States nor has he been a member of the Communist Party. However, in spite of all these claims the Immigration Judge and the Board of Immigration Appeals denied the petitioner's application for suspension of deportation because they found he would not suffer extreme hardship if he were deported from the United States.

Therefore, the petitioner filed a petition for review with this Court alleging that the Board of Immigration Appeals was in error in denying his application. While this matter was pending in this Court, the alien's son became a permanent resident of the United States. In view of this change in a material fact which was believed to be important by the petitioner's counsel, and which fact is material to this matter, an agreement was reached between counsel for the petitioner and counsel for the Immigration Service, whereby it was agreed to allow the Court action to be removed from the Court's docket without prejudice so that a Motion to Reopen could be made to the Immigration Service in view of the change in circumstances, to wit:

The presence of a close family member in the United States.

The petitioner then made a Motion to Reopen his deportation proceedings, pursuant to the stipulation of the parties. However, the Board of Immigration Appeals denied the Motion to Reopen finding that no prima facie case of extreme hardship was shown. Shortly thereafter, the instant petition for review was filed seeking review of the decisions of the Board of Immigration Appeals of September 10, 1973, and June 28, 1977.

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ARGUMENT

POINT I

THE ALIEN PROVED THAT HE WOULD SUFFER EXTREME
HARDSHIP IF DEPORTED FROM THE UNITED STATES.

The petitioner is a native and citizen of China who fled from the Chinese Mainland because of the oppression of the Communists who are in control of his homeland. He was fortunate enough to escape to Hong Kong where he was permitted to remain as a refugee. He has no travel documents. He cannot become a citizen of Hong Kong, nor can he travel to any other country in the world without valid documents. He would most probably be recognized as a refugee in Hong Kong if he were there today. He is truly in the status of a man without a country. In fact, he has now lived in the United States for more years than his temporary refuge in Hong Kong. The government cannot deport the petitioner to the Mainland of China, but since he has obtained a Hong Kong Seaman's identity book and seaman's travel papers issued by the government of Hong Kong, the Immigration Service is able to deport him to Hong Kong. It is interesting to note that the seaman's documents that Mr. Cheng has are limited in nature and can only be used in connection with service as a seaman. They cannot be used for any other purpose, and in fact, a new visa must be issued to allow Mr. Cheng to be deported to Hong Kong.

The petitioner has made a home for himself in the

United States. He is one of many who are in the unfortunate position of being a refugee unable to return to his own country and endeavoring to seek asylum and gain some status in the United States. In fact, at the time of deportation hearing he had made a substantial investment in a restaurant, since sold, which employed other persons at that time. He has never been arrested any place in the world, and has never been a member of the Communist Party. He has been a productive member of our society.

The United States has recognized that there are many Chinese persons presently residing in Hong Kong who are refugees from the Mainland of China, and they have opened an office in Hong Kong to accept refugee applications from those persons. It seems incongruous that this factor of Mr. Cheng being a refugee, was not given greater consideration by the Immigration Service in the United States. Mr. Cheng was uprooted when he was forced to flee from the Mainland of China. He has grown accustomed to life in the United States. How can the government say that to deport him now would not be an extreme hardship to him? He is not as young as he was when he was forced to flee from his home when the Communists took over China. The Immigration Service has ignored the fact that he resided in Hong Kong on a temporary basis only. They have ignored the fact that there are tremendous problems with reference to the Chinese Communist infiltration, sabotage and disrupting stresses and tactics in Hong Kong. They have

ignored the fact that Hong Kong has an extreme water shortage. That since the deportation proceedings about five years ago the Communists have taken over three additional countries, to wit: South Vietnam, Cambodia and Laos in the Far East. The claim that the alien made at his hearing with reference to a Communist take over of Hong Kong cannot be ignored. Charitably, they have conceded that he might have an economic problem if he were deported to Hong Kong, but they stated that mere economic detriment is not an extreme hardship. However, it is the considered opinion of the writer that economic detriment, plus the other factors present in this case have more than proven that the petitioner would suffer extreme hardship if deported from the United States.

In addition to all of the above, at the time of the deportation hearing, Mr. Cheng had no close relatives in the United States. After the hearing, and while this case was pending in the Court, his son became a Permanent Resident of the United States. This is a factor that could have made a difference in the original decision since one of the reasons for denial stated in the Immigration Judge's Order of February 12, 1973 is "the petitioner has no close blood relatives in the United States". Based upon a close blood relative's legal arrival in the United States, a Motion to Reopen was made, pursuant to stipulation. However, the Board ignored this new equity which arose after the deportation hearing, and denied the alien's Motion to Reopen. This denial in June, 1977, was indeed a harsh and unfair decision.

Deportation is a drastic measure which results in an alien's banishment from the United States, see *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10, 1948. Recognizing the cruelty of deportation, Congress has enacted several ways for a person to be relieved from the effects of deportation from the United States. Suspension of deportation was one of the first ameliorative provisions adopted by the Congress, and pursuant to Sec. 244 of the I&N Act, the Attorney General has the discretion to suspend deportation of any alien who meets certain statutory prerequisites. In the case of *Wadman v. I&N Service*, 329(f)2d, 812 (9th Cir. 1964). The Court states as follows:

"In construing 244, we are in an area in which strict construction is peculiarly inappropriate. The apparent purpose of the grant of discretion to the Attorney General is to enable that officer to ameliorate hardship and injustice which otherwise would result from a strict and technical application of the law. A strict and technical construction of the language in which this grant of discretion is couched could frustrate its purpose. A liberal construction would not open the door to suspension of deportation in cases of doubtful merit. It would simply tend to increase the scope of the Attorney General's review and thus his power to act in amelioration of hardship."

In the case at the bar and in other cases, the Immigration Service has strictly construed the extreme hardship provision of this relief statute. It is obvious that the petitioner would suffer more than economic hardship if deported from the United States.

The decisions of the Board of Immigration Appeals in these type of cases have been so harsh that for an alien to obtain relief, pursuant to this statute, has become an almost impossible task. See *San Diego Law Review*, Vol 14, No. 1, 1976, page 229.

The Board of Immigration Appeals has very rarely found that a person has proved extreme hardship if deported from the United States, and in many cases, their decisions lack consistency. In the case at the bar, the Board of Immigration Appeals denied the petitioner's application for one reason, and that is they stated that economic hardship alone is not a sufficient ground to prove extreme hardship. The Board erred in this matter because they did not take any other factors into consideration.

The petitioner, in the case at the bar, is a native and citizen of China. He cannot return to his native country because of the Communist control of that country. The Government cannot deport the petitioner to the Mainland of China, but since he worked as a seaman, with Hong Kong as the port, the Immigration Service is able to deport him to Hong Kong.

The Board of Immigration Appeals neglected to consider any of the favorable factors in Mr. Cheng's matter. They completely ignored the fact that he has been a resident of the

United States for more than thirteen years (well more than the statutory requirement of seven years). They ignored the fact that he is now fifty-four years old, and would not be able to obtain shipping employment abroad. The Immigration Service ignored the fact that Mr. Cheng was a temporary resident of Hong Kong. They have ignored the fact that there are tremendous problems with reference to the Chinese Communist's infiltration in Hong Kong. The Board of Immigration Appeals ignored the fact, and never considered the fact, as to whether or not the petitioner would have any other means available to him to return to his long residence in the United States.

The Immigration Judge, in his discussion of this matter, basically reviewed the petitioner's immigration history, and it is obvious from his decision and disregard of the favorable factors of the petitioner's case, that he was denying the alien's application because of the alien's immigration record. This is in error, as it is obvious that the alien must be deportable from the United States because he could not, otherwise, apply for the suspension of deportation. When considering the question of extreme hardship by the very nature of the application, the alien's contact with the Immigration Service should not be considered as an unfavorable factor. The purpose of the statute was to relieve a deportable alien from the errors he committed, upon which he is found deportable.

The question of extreme hardship is the question that should be considered. Whether or not he violated the Immigration law has nothing to do with whether or not he would suffer extreme hardship if deported.

In 1952, when the Immigration law was revised, the suspension of deportation, statute 244(a)(1) stated that an alien's deportation would have to result in exceptional and extremely unusual hardship to the alien.....

In 1962, there was a revision of the statute and the requirement was lessened to just extreme hardship. It is obvious that the Board of Immigration Appeals has not agreed to this revision, and still uses the standards for the person who must show exceptional and extremely unusual hardship.

The Board of Immigration Appeals has announced standards to be considered in assessing whether extreme and unusual hardship is present: they are, See 2C, GORDON & H. ROSENFELD, IMMIGRATION LAW and PROCEDURE 7.9(d) (rev.ed.1975) page 7-109:

1. Length of residence in the U.S. (including consideration of manner and purpose of entry).
2. Family ties in the United States.
3. Possibility of obtaining a visa abroad.
4. Financial burden on alien of having to go abroad to obtain a visa.
5. The health and age of the alien.

In the case at the bar, the petitioner has shown that these five elements are present so that he would suffer at least extreme hardship. The standards elaborated are those that are necessary to prove extreme, unusual hardship. Certainly, less than this, should be necessary when extreme hardship must be shown, as is present in the case at the bar.

The petitioner has been in the United States for thirteen years. A Visa is unavailable to him. His son is a Permanent Resident of the United States. It would be a financial hardship for him to go abroad and obtain a Visa. The Board has been too strict in their interpretation of this statute; one that is supposed to assist persons whose main "sin" is a violation of the Immigration laws.

Justice would be served if this matter were to be remanded to the Immigration Service with the direction that a more liberal approach be taken in this case.

The Immigration Service erred in that they did not take into consideration the relevant factors that they have stated which are important, to wit: length of residence in the United States, possibility of obtaining a Visa abroad, close family tie in the United States, economic hardship, and the health and age of the alien. If these factors were to be taken into consideration in this matter, Mr. Cheng's application would be approved. See also Matter of Louis, 10 Int. dec.225, and Matter of H 5 Int. dec.416.

POINT II

THE ATTORNEY GENERAL ABUSED HIS DISCRETION IN DENYING THE PETITIONER'S APPLICATION.

In an application for suspension of deportation, the Special Inquiry Officer and the Board of Immigration Appeals must make two decisions; firstly, they must find whether or not the alien would suffer extreme hardship if deported, and secondly, they must then determine if he did not suffer extreme hardship, whether or not, in their discretion, they would grant his application for suspension of deportation. The Special Inquiry Officer's Order, after finding that the alien would not suffer extreme hardship went further and said that, even if he did, he would deny the application as a matter of discretion. It appears to the writer that the Special Inquiry Officer's decision on discretion would have been different if he had first found the petitioner eligible for extreme hardship. After finding the petitioner ineligible because he did not prove extreme hardship, the Special Inquiry Officer should not have gone any further in his decision. If the petitioner did not prove exyreme hardship, he was therefore, ineligible to have his deportation suspended because extreme hardship is a statutory requirement, while discretion is otherwise. However, the Special Inquiry Office and the Board were over-zealous in denying this application even on a discretionary basis.

It appears to the writer that the Immigration Judge took into consideration the fact that the "respondent may have had some role in harboring a group of Chinese aliens without legal status". The applicant denied these allegations and no other proof was ever offered by the Immigration Service to substantiate such a claim. It was an error for the Immigration Judge to consider this matter at all, and it is also obvious that the Immigration Judge considered these allegations in finding reasons to deny the alien's application. Under our system of justice, allegations of wrong doing should not be considered unless they are criminal charges, or unless there is some proof other than hearsay, that criminal acts were committed. The Immigration Judge was improperly influenced by the accusations made by a biased investigator.

POINT III

THE BOARD'S DENIAL OF THE MOTION TO REOPEN WAS IN ERROR.

After the alien's deportation hearing, and while the Petition for Review was pending in this Court, the alien's son became a Permanent Resident of the United States. Based upon that fact, the Motion to Reopen was made, since this was considered a material change in circumstances.

Apparently, the Immigration Judge, when he denied the alien's application, stated as his first point, that the alien had no close relatives in the United States. This fact of having a close relative living in the United States assists an alien in his application on two grounds; one, having a close family relative in the United States contributed to his hardship; and secondly, having a close family relative in the United States is also an aid in the exercise of discretion favorable for the alien. For this reason, the Motion to Reopen was made.

The alien has now shown, and which has been found by the Board, that at least two of the standards that they have set forth have been complied with; one, some economic detriment when deportation is consummated, and two, presence of close family in the United States.

In the decision on the Motion to Reopen, the Board neglected to consider any of their previous findings of their

Order of 1973. For them to rule upon the Motion to Reopen without considering the findings made in the 1973 Order was improper. A denial of the Motion to Reopen was, therefore, in error.

NEW MATTER

Although not directly relate to the alien's case at the bar, the briefer would like to point out to the Court that an Immigration bill has been sent to Congress, whereby persons who entered the United States prior to January 1, 1970 would be allowed to adjust their status. Attached is from Interpreter Releases with reference to this legislation which is believed to be helpful to this Court.

CONCLUSION

WHEREFORE, it is respectfully requested that this matter be remanded to the Board of Immigration Appeals with a direction that the alien's application for suspension of deportation be granted, or in the alternative, that it be remanded back to the Immigration Service for them to conduct further hearings in this matter, in view of the changed circumstances since the original hearing, and for such further and different relief that this Court may deem just and proper.

Respectfully submitted,

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Of Counsel

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United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

File: A15 658 475 - New York

SEP 10 1973

In re: MAU KWAI CHENG

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jules E. Coven, Esquire
Lebenkoff & Coven
One East 42nd Street
New York, New York 10017

ON BEHALF OF I&N SERVICE: Irving A. Appleman, Esquire
Appellate Trial Attorney

ORAL ARGUMENT: May 1, 1973

CHARGES:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - Nonimmigrant crewman -
remained longer

Lodged: None

APPLICATION: Suspension of deportation

This is an appeal from an order of an immigration judge who denied the respondent's application for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act and granted him the privilege of voluntary departure, with the provision that if he did not depart when and as required he would be deported to Hong Kong, and if that country is

A15 658 475

unwilling to accept the respondent into its territory, the respondent shall be deported to the Republic of China on Formosa. The appeal will be dismissed.

The respondent is a 47-year-old married male alien, a native of China and a citizen of the Republic of China on Formosa, who entered the United States on or about March 29, 1964 at which time he was admitted as a nonimmigrant crewman authorized to remain in the United States for a period not to exceed 29 days. Thereafter, he was found to be deportable as an overstay crewman and granted voluntary departure. On November 7, 1967 he was served with notice to surrender for deportation but the notice was returned unclaimed. Then, in April 1971, he was apprehended and his counsel moved to reopen the proceedings to allow him to apply for suspension of deportation. It should be noted at this point that deportability is not in issue.

We have carefully reviewed the record, including counsel's representations on appeal, and conclude that the respondent has failed to sustain his burden of proof that he would suffer extreme hardship as alleged. He is thus not eligible for suspension of deportation under section 244(a)(1) of the Act. This is particularly true since the respondent has no close family ties in the United States and there is not a scintilla of evidence showing that he could not obtain suitable employment in Hong Kong. Although the respondent's deportation may result in some economic detriment to him, we are persuaded that he would not suffer the "extreme hardship," in the absence of other substantial equities, within the meaning of section 244(a)(1) of the Act, Matter of Sangster, 11 I&N Dec. 309 (BIA 1965). See: Fong Choi Yu v. INS, 439 F.2d 719 (9 Cir. 1971); Kasravi v. INS, 400 F.2d 675 (9 Cir. 1968). In any case, we are satisfied that in the light of all the evidence in the record, the immigration judge properly

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exercised his discretion in denying the respondent's application for suspension of deportation. One further comment is appropriate. We reject the respondent's contention that extreme hardship would result if he is deported because of his ownership of an interest (acquired during the pendency of the deportation proceedings) in a restaurant. This is not sufficient to make out the extreme hardship contemplated by the statute, Kasravi v. INS, supra; Kwang Shick Myung v. INS, 368 F.2d 330 (7 Cir. 1966). Accordingly, in view of the foregoing, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Acting⁺ Chairman

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United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

File: A15 658 475 - New York

In re: MAU KWAI CHENG

IN DEPORTATION PROCEEDINGS

JUN 28 1977

MOTION

ON BEHALF OF RESPONDENT:

Jules E. Coven, Esquire
Lebenkoff & Coven
One East 72nd Street
New York, NY 10017

ON BEHALF OF I&N SERVICE:

William Strasser
Trial Attorney

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)) - nonimmigrant crewman -
remained longer than permitted

APPLICATION: Motion to reopen

In a decision dated September 10, 1973, we dismissed the respondent's appeal from an order of an immigration judge who denied the respondent's application for suspension of deportation pursuant to section 244(a)(1) of the Immigration and Nationality Act and granted him the privilege of voluntary departure, with the provision that if he did not depart when and as required, he would be deported to Hong Kong, and if that country would be unwilling to accept the respondent into its territory, the respondent would be deported to the Republic of China on Formosa.

Subsequently, the United States Court of Appeals for the Second Circuit dismissed without prejudice respondent's petition for review of our order to permit the

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filing of a motion to reopen these deportation proceedings for the purpose of applying for suspension of deportation pursuant to section 244 on the basis that the respondent's son has become a lawful permanent resident. Kwai v. INS, ___ F.2d ___ (2 Cir., February 1976).

In his motion submitted March 5, 1976, the respondent requests that the deportation hearing be reopened so that an application for suspension may be submitted. Supporting respondent's motion to reopen is his affidavit dated February 17, 1976, in which he states, inter alia, 1) that he has been a resident of the United States since March, 1964, 2) that since his hearing in 1973, his son has become a lawful permanent resident (A34 623 810), and 3) that he would suffer extreme hardship if he were deported from the United States.

The Service Memorandum in Opposition to Motion to Reopen, dated June 1, 1976, was mailed to counsel.

Eligibility of the respondent for suspension of deportation is governed by section 244(a)(1) of the Immigration and Nationality Act. That section requires that the respondent shall have been physically present in the United States continuously for a period of at least seven years immediately preceding the date of his application and that he prove that during all of such period he was, and is, a person of good moral character. Additionally, the respondent has the burden of showing that his deportation would result in extreme hardship to himself or his lawful permanent resident son.

The respondent meets the requirement of seven years physical presence, moreover, his good moral character is not in question. However, he does not show that his deportation would result in extreme hardship to himself or his lawful permanent resident son.

We find that the respondent has not made a prima facie showing for reopening to consider his application for suspension of deportation. Accordingly, we will deny counsel's motion to reopen.

ORDER: The motion to reopen and reconsider is denied.

Chairman

Board Members Irving A. Appleman and Mary P. Maguire abstained from consideration of this case.

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A15 658 475 - New York

FEB 12 1973

In the Matter of)

MAU KWAI CHENG)

Respondent)

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act - Section 241(a)(2)(8 USC 1251(a)(2)) -
remained longer - nonimmigrant crewman

APPLICATION: I & N Act - Section 244(a)(1) - Suspension of
deportation; or voluntary departure

In Behalf of Respondent:

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Lebenkoff & Coven, Esqs.
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In Behalf of Service:

Martin J. Travers, Esq.
Trial Attorney
New York, N. Y. 10007

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 47-year-old married male alien, a native of China and a citizen of the Republic of China on Formosa who entered the United States at Baltimore, Maryland on or about March 29, 1964 at which time he was admitted as a nonimmigrant crewman authorized to remain in the United States for the period of time his vessel remained in port, not to exceed 29 days. On June 10, 1964 an order was entered finding him deportable as an overstay crewman and granting him the privilege of voluntary departure, with an alternate provision for his deportation to Hong Kong, the country designated by him, and in the

alternative, to the Republic of China on Formosa. Pursuant to this order he was given until October 6, 1965 to depart voluntarily and upon his failure to do so a warrant of deportation was entered on October 11, 1966. On November 7, 1967 a notice was sent to him at his stated address to surrender for deportation on November 16, 1967, but this notice was returned unclaimed. He was subsequently apprehended in April 1971, which resulted in a reopening of the proceedings on his attorney's motion, to permit him to apply for suspension of deportation.

Deportability is not in issue.

The respondent has no close blood relatives in the United States. Although in an affidavit executed on June 3, 1964 he stated that he had no children, during the course of the reopened hearing he alleged that his wife and a daughter reside in China and a son resides in Hong Kong. According to his testimony he is now a partner in a restaurant in which he has invested about \$12,500, of which \$5,000 represents borrowed money.

Affidavits of witnesses and other documentary evidence have been presented on the basis of which a finding might be warranted that the respondent has been continuously physically present in the United States for at least the preceding seven years.

The respondent claims that his deportation would entail extreme hardship to him because he has lived in the United States for a long period of time and would be unable to earn a living abroad. He further stated

that he cannot return to the mainland of China because of his opposition to communism and that he fears to return to Hong Kong because the communists may gain control of that territory.

Any economic detriment that the respondent may suffer from his alleged difficulty in obtaining work in Hong Kong is insufficient, per se, to qualify for suspension of deportation. (Matter of Uy, 11 I&N Dec. 159, (BIA, 1965); Kwang Schick Myung v. Immigration and Naturalization Service, 368 F. 2d, 330 (7th Cir. 1966). The fact that he now has an interest in a restaurant business which he acquired recently in July 1972, during the pendency of these proceedings, is not deemed to constitute extreme hardship. Likewise, respondent's alleged fear to return to Hong Kong does not qualify him for suspension of deportation. It is noted that he has designated Hong Kong as the country to which he prefers to be deported and he never suffered any form of persecution while in Hong Kong.

Assuming for the purpose of this decision, that the respondent meets the minimum requirements for eligibility for suspension of deportation, nevertheless as a matter of administrative discretion that privilege should not be extended to him. Although the respondent has resided in the United States for a period of over eight years he has managed to eke out a substantial portion of his residence by failing to report to the Immigration Service pursuant to an order of supervision, and to surrender for deportation as directed in a letter dated November 7, 1967, addressed to him at his last stated address. Only after the Service located him and took him into custody in April 1971 was a motion made to reopen these proceedings to enable the respondent to apply for suspension of deportation.

A report of investigation conducted by the Service suggests that the respondent may have had some role in harboring a group of Chinese aliens without legal status while residing at 410 East 13th Street, apartment 18, New York, New York. The respondent acknowledged that he resided at that address for approximately one year from November 1964 to October 1965, but has not lived there since. He claims that except for a short period of time when he lived and worked outside of New York City he resided at 424 East 13th Street, New York, N. Y., from 1965 to date. However, in his Form I-256A (Application for Suspension of Deportation) the respondent failed to list the 410 East 13th Street address at all. Although he acknowledged that he gave some thought to listing that address in the suspension application, he failed to give any satisfactory explanation as to the reason for such failure. The record creates strong doubt as to the propriety of the respondent's motives in failing to disclose that address in his application.

Even if the discrepancies as to respondent's places of residence in the United States be resolved in his favor, nevertheless it is felt that he does not merit the grant of suspension of deportation because of the manner in which he prolonged his stay in the United States and acquired the necessary period of residence for suspension of deportation. The maximum relief warranted is the privilege of voluntary departure which will be extended to the respondent to afford him a final opportunity to leave the United States. In view of the fact that he has been previously granted the privilege of voluntary departure, the time for departure

will be delegated to the discretion of the District Director. (Matter of Yeung, Int. Dec. 2036 (BIA, 1970)).

Upon respondent's failure to depart when and as required, he should be deported to Hong Kong, and if deportation cannot be effected to that place then to the Republic of China on Formosa.

ORDER: IT IS ORDERED that the respondent's application for suspension of deportation under Section 244(a)(1) of the Immigration and Nationality Act be denied.

IT IS FURTHER ORDERED that in lieu of deportation the respondent be granted voluntary departure without expense to the government within such time and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to Hong Kong on the charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that if the aforementioned country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within three months following original inquiry whether it will or will not accept the respondent into its territory respondent shall be deported to the Republic of China on Formosa.

HENRY I. MILLMAN
Immigration Judge

INTERPRETER RELEASES

An Information Service on Immigration, Naturalization and Related Problems

American Council for Nationalities Service
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BULLETIN

Maurice A. Roberts
Editor

October 7, 1977

ADMINISTRATION'S UNDOCUMENTED ALIENS BILL SENT TO CONGRESS

The Attorney General has sent to both Houses of Congress the text of the bill drafted by the Administration to provide for amnesty and sanctions in the cases of undocumented aliens. The proposed legislation will be known as the "Alien Adjustment and Employment Act of 1977". It is expected that it will be introduced in the House by Rep. Peter W. Rodino, Jr. (D-NJ) and in the Senate by Senators James O. Eastland (D-Miss.) and Edward M. Kennedy (D-Mass.).

The bill follows the pattern proposed in President Carter's message to Congress on August 4, 1977. (For a discussion of that message, see Interpreter Releases, Vol. 54, No. 35, August 22, 1977, pp. 287-291). The following are its highlights: (1) §249 of the INA is amended by moving the entry date from "prior to June 30, 1948" to "prior to January 1, 1970", and by eliminating the good moral character and citizenship eligibility requirements. Excepted are aliens who assisted in persecuting others. The administrative practice of not charging §249 adjustments to numerical limitations is codified.

(2) A discretionary grant of temporary residence for 5 years from the Act's effective date is authorized for aliens who entered the U.S. on or before January 1, 1977, resided here continuously since, and are not inadmissible on the more serious exclusion charges. Excepted are nonimmigrants who were in status on January 1, 1977 or who had student status immediately before losing lawful nonimmigrant status or were formerly exchange visitors who were subject to but had not fulfilled or received a waiver of the two-year foreign residence requirement. Also excepted are aliens who assisted in persecuting others. Aliens granted such temporary status are to receive employment authorization and are to be readmitted without documents or labor certification following a temporary absence abroad. They are not to receive other rights under the INA (e.g., conferring visa preference status on relatives) and are ineligible for benefits under certain Federal statutes, such as AFDC, SSI, food stamps. Provision is made for rescission of temporary resident alien status obtained without eligibility.

(3) It is made unlawful to employ an alien not lawfully admitted for permanent residence, unless the Attorney General has authorized employment. A \$1,000 civil penalty is provided for each violation. The Attorney General is authorized to sue in the U.S. District Court for both the civil penalty and

injunctive relief against an employer who has engaged in a pattern or practice of employing aliens in violation of this provision. Proof that the employer saw documentary evidence of the employee's eligibility to work before hiring him creates a rebuttable presumption of no violation with respect to that employee. Those who knowingly and for gain assist unauthorized aliens to get jobs are subjected to a felony conviction, with up to \$2,000 fine or 5 years prison, or both, for each offense. State or local laws imposing sanctions or employers are preempted.

(4) The Act becomes effective 60 days after enactment.

The text of the bill and a section-by-section analysis will be set forth in a forthcoming issue of Interpreter Releases.

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UNITED STATES ATTORNEY
10/21/77